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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| COUNTY OF SONOMA ex rel. DOROTHY L. HANSEN,<br>Plaintiff and Appellant,<br>v.<br>SUTTER HEALTH et al.,<br>Defendant and Respondent. | A093346<br><br>(Sonoma County Super. Ct. No. SCV 221918) |

Dorothy L. Hansen appeals from a judgment entered in favor of Sutter Medical Center of Santa Rosa, and Sutter Health, (hereafter, collectively, "Sutter Health") on her complaint for violation of the False Claims Act and the Unfair Competition Law. These causes of action were based upon allegations that Sutter had promised the County of Sonoma (County) it would spend $4 million on seismic safety improvements in the first two years of its lease of the County hospital; yet, in response to requests for documentation of compliance, provided a list of capital expenditures unrelated to seismic safety.

## FACTS

### 1. The Complaint

Hansen's complaint alleged that Sutter is obligated under the terms of a March 25, 1996, Health Care Access Agreement (Agreement) and Lease to spend $4 million on seismic safety improvements to the Santa Rosa Community Hospital (Hospital) it leased from the County. The complaint further alleged that Hansen's late husband, on June 10,

1998, requested confirmation from the County that these capital expenditures had been made. On June 16, 1998, Ron Piorek, a Deputy County Administrator, mailed to the Hansens a computer printout Sutter had provided to the County, listing capital expenditures in the first two years of the contract. None of the items listed were capital expenditures for seismic safety. The complaint alleged, "[t]he production of this document by Sutter to the County, in direct response to Robert Hansen's inquiry, falsely purported to reflect compliance with the terms of the lease requiring seismic safety improvements[,] . . . [and] . . . was an attempt to mislead, and constituted a knowingly false claim to the County . . . that Sutter had performed the seismic safety improvements," required by the Agreement and Lease.

Based upon these alleged facts, the complaint pleaded three causes of action under the California False Claims Act: The first cause of action alleged a violation of Government Code[1] section 12651, subdivision (a)(1), which applies to any person who knowingly presents, or causes to be presented, to an employee or officer of any political subdivision of the state, a false claim for payment or approval. The second cause of action alleged a violation of section 12651, subdivision (a)(2), which applies to any person who knowingly makes or uses a false record or statement for the purpose of getting a false claim paid or approved. The third cause of action alleged a violation of section 12651, subdivision (a)(7), which applies to any person who knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money, or property, to a political subdivision of the state. The fourth cause of action alleged that the same act underlying the first three causes of action, also violated California's Unfair Competition Law. (Bus. & Prof. Code, §§ 17200 et. seq.)

**2. The Motion for Summary Judgment**

After answering the complaint and conducting discovery, Sutter filed a motion for summary judgment on two separate grounds:

[1] All subsequent statutory references are to the Government Code unless otherwise indicated.

First, it argued, under the terms of the Agreement and Lease, Sutter was not obligated to make $4 million in seismic safety improvements in the first two years of the lease. Instead, it was obligated to make $4 million in capital expenditures, which it documented by the computer printout it provided to the County. Sutter did not deny that it had a seismic safety obligation under the terms of the Lease and Agreement, but argued that it is not limited to a particular dollar amount. Instead, Sutter is obligated to provide health care services throughout the 20-year term of the lease either at reconstructed or replacement hospital facilities that satisfy the state seismic safety standards that are scheduled to become effective in 2008.

In support of this contention, Sutter relied upon section 10.11 of the Agreement, captioned "Seismic Safety Changes," which acknowledged that changes in seismic safety laws applicable to acute care hospitals were expected to become effective in 2008, and will " require Sutter to replace or renovate the health care facilities in which services are provided, and that prudence requires early planning for this eventuality. To assure access by Sonoma County residents to quality, cost-effective services, Sutter agrees to institute the following process:

"10.11.1. Capital Commitment. Before June 30, 2008, Sutter shall spend no less than Twelve Million Dollars ($12,000,000) in Capital Expenditures, as that term is defined in the Lease, to the health care facilities required to meet its obligations under this Agreement, including no less than Four Million Dollars ($4,000,000) in Capital Expenditures to the health care facilities on the Premises during the first two (2) years of the Term, all in accordance with Section 3.3 of this Lease."[2]

Article 1 of the Lease defined Capital Expenditures as follows:

[2] The lease similarly stated:
"3.3. "Capital Expenditures. Prior to June 30, 2008, Sutter shall spend no less than Twelve Million Dollars ($12,000,000) in Capital Expenditures to the health care facilities required to meet its obligations under the HCA Agreement, including no less than Four Million Dollars (4,000,000) in Capital Expenditures to the health care facilities on the Premises during the first two (2) years of the Term."

"Capital Expenditures shall mean those amounts Sutter is obligated to expend pursuant to Ssection 10.11.1 of the HCA Agreement . . . and Section 3.3 of this Lease. Capital Expenditures may consist of improvements to the Buildings or purchases of Fixed Equipment or Moveable Equipment. Generally Accepted Accounting Principles will apply in classifying items as Capital Expenditures."

Other portions of section 10.11 require that Sutter develop a "Master Site Plan" no later than June 30, 1998 (10.11.2) and prepare a Health Care Access Business Plan no later than June 30, 2003 (10.11.3) describing how Sutter shall provide "Services during the remainder of the Term and the capital improvements necessary to do so." The Business Plan must ensure that, whether it is at the Hospital site or another location approved by the County, Sutter will continue to provide County health care services in a manner that meets or exceeds prevailing standards of quality, access, and cost containment during the entire term of the Lease.

Sutter also submitted the declaration of Ron Piorek, the deputy county administrator, who was primarily responsible for solicitation of proposals to lease the Hospital, and provide County health care services, and for negotiation of the Lease and Agreement. He declared that Sutter's initial response to the solicitation included a proposal to make $12 million in "improvements to the Hospital over the 20-year term of the lease, including $4 million during the first two years of the lease." He further explained that the parties were aware that, in 2008, a new seismic safety law would become effective, which could require substantial renovation or reconstruction of the hospital, which would cost much more than the $12 million Sutter initially proposed for capital improvements. Therefore, the process described in section 10.11 was established, requiring Sutter to replace or renovate the hospital to comply with the new seismic standards, or, subject to the County's approval, to provide health care services by other means. He further declared that, in order to address the need for other capital expenditures such as medical equipment, it was agreed that Sutter's proposal to spend $12 million in capital improvements should be restated to require $12 million in "Capital Expenditures" as set forth in section 10.11.1 of the Agreement and article 3.3 of the

Lease. He further declared: "Because the seismic safety regulations had not been published, and the Business Plan to respond to them was not [due] until 2003, the County negotiators anticipated that the obligation of Sutter Santa Rosa to make $4 million in capital expenditures during the first two years of the lease would, as a practical matter, cause Sutter to spend a substantial portion of the $4 million on needed equipment, [or deferred maintenance,] rather than seismic safety improvements."

Sutter also submitted the declaration of Clifford Coates, who was the Chief Executive Officer of Sutter Santa Rosa, and had participated in negotiation of the Lease and Agreement. He confirmed Piorek's description of the course of negotiations, and understanding of the obligation of Sutter to comply with the new seismic safety laws, and to make $4 million in capital expenditures under sections 10.11.1 of the Agreement, and 3.3 of the Lease. He further declared that Sutter was also required to comply with current seismic requirements and that, to the best of his knowledge the Hospital did comply with current standards.

As its second ground for summary judgment, Sutter asserted that the undisputed facts established that Sutter did not "knowingly" or falsely represent that it had made $4 million in seismic improvements by providing the printout listing $4 million in capital expenditures. In support of this contention, Sutter submitted evidence that on or about May 20, 1998, Ron Piorek sent a letter to Coates, requesting that Sutter provide several documents under the terms of the Agreement, including: "Capital Investment - Currently due. Investment of $4 million by March 26, 1998 (HCA [Agreement] Sec. 10.11.1. This may be documented in your Annual Operational Report, or submitted by separate report." In response, on June 15, 1998, Robert Grace, the Chief Financial Officer of Sutter, supplied a computer printout to Piorek, which Grace described in his cover letter as a list of "capital investments from March 1996 through March of 1998," in satisfaction of section 10.11.1 of the Agreement.

In the meantime, on June 10, 1998, Robert Hansen, the deceased husband of appellant, sent a letter to the Board of Supervisors which stated: "According to the Health Care Access Agreement between Sutter and the County, Sections 10.11 and

10.11.1, Sutter agreed to spend 'no less than Four Million Dollars in Capital Expenditures to the health care facilities on the Premises during the first two years of the term,' in anticipation of 'changes to the seismic safety laws applicable to general acute care hospitals which are expected to become effective in 2008 [which] will require Sutter to replace or renovate the health care facilities in which Services are provided.' " Hansen requested that he be provided with " a list of these expenditures in sufficient detail that they can be vertified."

In response, Piorek transmitted to Hansen the printout he had received from Robert Grace, with a cover letter thanking him for his letter and acknowledging his request for a "list of Sutter Medical Center's capital expenditures during their first two years of the lease." Piorek declared that he did not recall giving a copy of Hansen's June 10, 1998 letter to Robert Grace, or telling Grace about it. He did remember mentioning at unspecified times that members of the public had wanted to see information relating to the Lease and Hospital. Robert Grace declared that he was unaware of Hansen's letter when he provided the printout in response to Piorek's inquiry, and that he was unaware of any request by a member of the public for information about seismic safety improvements. He did not represent to the County or anyone else that the capital expenditures were for seismic safety improvements.

Based upon the foregoing facts, Sutter argued that the information provided in the printout was not false, or submitted or made with knowledge of falsity, within the meaning of the False Claims Act, nor did it constitute an unfair business practice. It argued it was asked only for documentation of capital expenditures required by the Lease and Agreement, and it provided a list of such expenditures.

In opposition to the motion, appellant did not dispute the accuracy of the terms of the Lease and Agreement respondent submitted, but did raise parole evidence, relevance, and other objections to the declarations of Piorek, and Coates, explaining the course of negotiations, and the parties' mutual understanding of the meaning of the terms of the Lease and Agreement. Instead, primarily in reliance upon the caption of section 10.11, "Seismic Safety Changes," appellant argued that the terms of the Lease and Agreement

did impose an obligation upon Sutter to spend $4 million on seismic safety improvements. With respect to knowledge, and falsity of the printout, appellant did not dispute that Sutter provided the printout in response to Ron Piorek's May 20, 1998 letter, which asked for a list of all capital expenditures and was not limited to seismic safety. Appellant, however, offered evidence that Robert Grace, must also have been aware of Hansen's letter, which referred to capital expenditures in anticipation of changes is seismic safety laws, and cited the fact that both the County's and Hansen's letters referred to the terms of the Lease and Agreement. Appellant argued that, in this factual context, providing the computer printout implied falsely that the list satisfied the contractual obligation to spend $4 million on seismic safety.

**3. The Order Granting Summary Judgment**

The court declined to interpret the terms of the Lease and Agreement. Instead it held that the undisputed facts established that "the list of capital expenditures was not falsified and not presented for the purpose of misleading anyone. (Statement of Undisputed Facts 11-18). . . . [¶] Plaintiff has not presented non-speculative evidence showing a material dispute of fact. . . . that the alleged wrong doer acted with knowledge that the information was false or in deliberate ignorance of the truth or falsity of the information or in reckless disregard of the truth or falsity of the information. The [plaintiff][3] has not presented non-speculative evidence showing that the list was false or was intended by the Defendants or the County to mislead anyone. Plaintiff's evidence is circumstantial, speculative, and insufficient to raise a triable issue of fact."

**ANALYSIS**

In the proceedings below, the alleged act underlying the causes of action under the False Claims Act, and the cause of action under the Unfair Competition Law, was that Sutter, by submitting the printout of capital expenditures to the County, falsely certified that it had spent $4 million on seismic safety improvements, and thereby avoided its obligation under the Lease and Agreement. We shall hold that the trial court correctly concluded that respondent was entitled to summary judgment as to all causes of action,

[3] Although the word "defendant" appears in the order it is obviously a clerical error.

although for different reasons than those stated in the court's order. We shall affirm on the ground that, as a matter of law, Sutter's obligation under the Lease and Agreement was to spend $4 million on capital expenditures, and the undisputed facts established that the printout it provided was not false, illegal, unfair or fraudulent.

**1. False Claims Act**

The trial court declined to interpret the terms of the Lease and Agreement, and instead disposed of the matter based upon the conclusion that the undisputed facts established that Sutter did not "knowingly" provide false information, as that term is defined by section 12650, subdivision (b)(2) of the False Claims Act.[4] We, however, find it necessary to decide the meaning of section 10.11.1 of the Agreement and the related provisions of the Lease, because appellant's premise that Sutter had an obligation to spend $4 million on seismic safety improvements in the first two years of the lease is inextricably intertwined with her allegation that Sutter attempted to avoid that obligation by "knowingly" providing the list of the capital expenditures not limited to seismic safety improvement as a false certification of compliance. (See § 12651, subd. (a)(7) [applies to any person who knowingly makes uses, or causes to be made or used, *a false record* or statement *to conceal, avoid, or decrease an obligation to pay or transmit money or property* to a political subdivision of the state].) The issue of contract interpretation cannot be avoided by affirming on the ground that there was no triable issue of fact regarding the knowledge element as defined in section 12650, subdivision (b)(2), because appellant's theory and evidence with respect to the element of knowledge assumes that references in Hansen's letter to section 10.11.1, and similar references in the communications from the County asking for documentation of compliance, support the inference that Sutter either actually knew, or acted with deliberate ignorance, or in reckless disregard of the fact that the information requested was a list of capital expenditures *related to seismic safety improvements*, not all capital expenditures. Whether such an inference is supported by appellant's evidence, thereby creating a triable

issue of material fact, in turn depends on the accuracy of the premise that the contract provisions referred to in these letters imposed an obligation to spend $4 million on seismic safety improvements.

The interpretation of a contract is normally a question of law, to be determined by the court. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861; *De Guere v. Universal City Studios, Inc.* (1997) 56 Cal.App.4th 482, 501.) In this case, the meaning of the terms of the contract can be determined from the document itself, without resort to the declarations of Coates and Piorek regarding the course of negotiations, and the parties' mutual understanding of its terms. It, therefore, is unnecessary to resolve appellant's evidentiary objections to these declarations, and we instead shall interpret the plain language of the writing itself. (Civ. Code, §§ 1638, 1639.)

Section 10.11.1 of the agreement requires only that, "[b]efore June 30, 2008, Sutter shall spend no less than Twelve Million Dollars . . . in *Capital Expenditures,* as that term is defined in the Lease, to the health care facilities required to meet its obligations under this Agreement, *including no less than Four Million Dollars . . . in Capital Expenditures to the health care facilities on the Premises during the first two (2) years of the Term,* all in accordance with section 3.3 of the Lease." (Italics added.) Article I of the Lease defines "Capital Expenditures," in pertinent part, as follows: "Capital Expenditures may consist of improvements to the Buildings or purchases of Fixed Equipment or Moveable Equipment." Nothing in section 10.11.1 or Article 1 specifies that the $4 million in capital expenditures must be for seismic safety improvements, or defines "Capital Expenditures" in a way that limits such expenditures to improvements or equipment related to seismic safety.

Nor can the caption of section 10.11 "Seismic Safety Changes," be used either to limit the type of capital expenditures required by 10.11.1, or to create an ambiguity that does not otherwise exist, because Section 11.6 of the Agreement provides: "The table of

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[4] Section 12650, subdivision (b)(2) provides that, "knowing" and "knowingly" means a person has "actual knowledge," or acts in "deliberate ignorance," or "reckless disregard,"

contents and the captions of the various articles and sections of this Agreement are for convenience and ease of reference only and *do not define, limit, augment or describe the scope, content or intent of this Agreement* or of any part or parts of this Agreement." (Italics added.)

In any event, in addition to violating the express terms of section 11.6, it would violate basic rules of construction if the caption of section 10.11 were used to imply a limitation that the $4 million in capital expenditures must be related to seismic safety improvements, because an inconsistency or ambiguity would then be created between section 10.11.1, and Article 3.3 of the Lease, where none would otherwise exist: Article 3.3 repeats the obligation set forth in section 10.11.1 to spend "no less than Four Million Dollars . . . in Capital Expenditures to the health care facilities on the Premises during the first two (2) years of the Term." Like section 10.11.1 of the Agreement, nothing in the language of Article 3 specifies that the capital expenditures must be for seismic safety improvements. However, unlike section 10.11.1, Article 3 does not have a caption that refers to seismic safety. Instead, it is captioned " RENT AND OTHER CONSIDERATION," and 3.3 itself is merely captioned "Capital Expenditures." Therefore, resort to the caption heading of section 10.11 to imply the limitation appellant suggests, would result in an inconsistency between the obligation to spend $4 million in capital expenditures as stated in section 10.11.1 which would be limited to seismic safety, and the obligation as stated in article 3.3, which has no such limitation.

We therefore conclude that the plain language of the Lease and Agreement is susceptible of only one reasonable interpretation: Sutter was obligated by section 10.11.1 of the agreement and Article 3.3 of the Lease to spend at least $4 million on improvements to the buildings, or purchases of fixed equipment, or moveable equipment, in the first two years of the lease. It was undisputed that Sutter *did* provide "a list of capital investments made during the first two years of the lease," and the total expenditures exceeded $4 million.

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of the truth or falsity of the information.

The premise underlying all of appellant's False Claims Act causes of action is that the Lease and Agreement obligated Sutter to spend $4 million in capital expenditures *related to seismic safety improvements*, and that the printout was a knowingly false certification that Sutter had fulfilled that obligation because the capital expenditures listed were *not related to seismic safety improvements*. Respondent's burden on motion for summary judgment is to demonstrate that the plaintiff cannot establish one of the necessary elements of a cause of action. (Code Civ. Proc., § 437c, subd.(c).) In light of our conclusion that, as a matter of law, Sutter was obligated only to expend $4 million in capital expenditures, whether or not related to seismic safety, in the first two years of the Lease, and that the undisputed facts are that the computer printout provided a list of more than $4 million in capital expenditures, appellant cannot establish that the printout Sutter provided was used to avoid "an *obligation to pay or transmit money, or property*" to the County, nor, (assuming arguendo that submission of the printout for "approval," of its compliance with the terms of the Lease and Agreement constitutes a "claim,")[5] that it was "*false*." (§ 12651, subd. (a)(1), (a)(2), & (a)(7).)

It therefore is unnecessary even to reach appellant's contention that her evidence created a triable issue of fact on the question whether Sutter *knew* that the information it provided, or the record it made, was false.

**2. Unfair Competition**

The complaint alleged that the same act that constituted a false claim, i.e., submission of the list of capital expenditures *unrelated* to seismic safety improvements, as certification of compliance with the alleged obligation to spend $4 million in capital expenditures *related* to seismic safety improvements, also constituted unfair competition.[6]

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[5] A " '[c]laim' includes any request or demand for money, property or services, made to any employee, officer, or agent of the state or of any political subdivision . . . ." (§ 12650, subd. (a)(1).)

[6] The court granted appellant's motion to effect late service of her opening brief on the Sonoma County District Attorney and the California Attorney General. (Bus. & Prof. Code, § 17209.)

Business and Professions Code section 17200 provides: "[U]nfair competition shall mean and include any *unlawful, unfair, or fraudulent* business act or practice . . . ." (Italics added.) "The statutory language referring to 'any unlawful, unfair *or* fraudulent' practice . . . makes clear that a practice may be deemed unfair, even if not specifically proscribed by some other law. 'Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent.' " (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180, quoting *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647.)

The only other law that appellant contended was violated by the submission of the computer printout, was the False Claims Act. Therefore, for the same reasons that appellant cannot establish a violation of the False Claims Act, appellant cannot establish that the alleged act constituted unfair competition under the "unlawful" prong of the definition of unfair competition.

A practice or act is "unfair" if it "offends an established public policy or . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers . . . ." (*Podolsky v. First Healthcare Corp., supra,* 50 Cal.App.4th 632, 647.) Appellant argued below that Sutter's false certification that it had performed the promised expenditures was "*unfair*" because the promise that it would make such seismic safety improvements gave it an unfair advantage in competition with other hospitals, and its false certification that it performed that obligation exposed the citizens of the County to risk of injury in a major earthquake. As we have explained, however, Sutter *did not* promise that it would spend $4 million on seismic safety improvements in the first two years of the lease, nor did submission of the computer printout falsely certify that it had.[7] We can find nothing "unfair," about provision of the computer printout truthfully listing

[7] Sutter also did not deny that it had an obligation, as defined in sections 10.11.2 and 10.11.3 of the Agreement to develop a Master Site plan and business plan addressing how it proposed to comply with the seismic safety changes when they went into effect, and provided the declaration of Coates to the effect that, to the best of his knowledge Sutter was in compliance with all *current* structural seismic safety standards.

Sutter's capital expenditures in compliance with the promise actually made in the Lease and Agreement.

Nor is there any triable issue of fact, as to whether the provision of the computer printout was fraudulent, even under the broad definition of fraud under the unfair competition law, which requires only that "members of the public are likely to be deceived." (*Podolsky v. First Healthcare Corp., supra,* 50 Cal.App.4th at p. 650.) The provision of a computer printout listing Sutter's capital expenditures for the first two years of the Lease, could not possibly be "reasonably likely to mislead," if the contract itself imposed no obligation to spend $4 million on seismic improvements. Moreover, Robert Grace's cover letter to Piorek represents only that the list documents Sutter's, "capital investments from March 1996 through March of 1998," and Ron Piorek's cover letter forwarding the list to Hansen similarly describes the list as, "a list of Sutter Medical Center's capital expenditures during their first two years of the lease."

**3. Contention that Sutter Violated the Unfair Competition Law by Placement of Contract Language Regarding Capital Expenditures Under Seismic Safety Caption.**

Finally, for the first time on appeal, appellant asserts that an entirely different act underlies the causes of action alleged in the complaint. Specifically, appellant suggests that, by placing contract language regarding its obligation to make $4 million in capital expenditures in a section of the Agreement captioned "Seismic Safety Changes," and then defining "Capital Expenditures" in a separate document, i.e., the Lease, Sutter engaged in conduct that was, at a minimum "unfair," or "likely to deceive," within the meaning of section 17200, by making it *appear* to have promised to spend $4 million on seismic safety improvements in the first two years of the Lease.

The issue, however, is waived on appeal, because appellant neither alleged it, nor presented it in its argument and evidence in opposition to the motion. It is a well-established appellate principle that " '[a] party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing party.' " (*North Coast Business Park* v. *Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29.) Nor is the

issue raised purely an issue of law, which this court, may, in its discretion, consider for the first time on appeal, because resolution of the merits of appellant's contention would require a factual record of how the language of the agreement came to be included under the heading, "Seismic Safety Changes." In the absence of notice of appellant's theory, respondent had no opportunity to develop or present evidence on this issue. In fact, appellant in the proceedings below, objected to the only the testimony either party submitted that might be relevant to this issue, which consisted of Clifford Coates' declaration that he did not know how the language came to be included under that heading.

We conclude that Sutter was entitled to summary judgment on all causes of action alleged in the complaint because, as a matter of law, the Lease and Agreement imposed an obligation to spend $4 million in capital expenditures, and the undisputed facts establish that Sutter provided a computer print out listing more than $4 million in capital expenditures during the first two years of the lease. Although appellant may have misunderstood the contract to impose an obligation to spend $4 million in seismic related safety improvements in the first two years, and expected the list to document compliance with such an obligation, the undisputed facts established that the printout provided was neither knowingly false, nor unlawful, unfair, or fraudulent.

**CONCLUSION**

The judgment is affirmed.

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Stein, Acting P.J.

We concur:

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Swager, J.

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Marchiano, J.